



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

April 2, 1998

Mr. Willard L. Jackson, Jr.
Chairman, Board of Regents
Texas Southern University
3100 Cleburne Avenue
Houston, Texas 77004

Letter Opinion No. 98-036

Re: Whether a member of the Texas Southern
University Board of Regents may serve as a
volunteer, uncompensated coach (RQ-1025)

Dear Mr. Jackson:

You inform us that at Texas Southern University, a member of the Board of Regents has volunteered to coach the kickers for the football team. He performed this service last football season and is currently performing this service. You state that he is not paid a salary, nor does he receive any other compensation for his work, and that he pays his own personal expenses, including travel and food, at all times. A question has been raised that this non-compensated volunteer service may violate the law, constitute a conflict of interest, or may otherwise be improper in some manner.

You ask whether the provision of the volunteer services by the regent violates "law, rules, regulations, or any code of ethical standards of the State of Texas" governing the conduct of a member of the Board of Regents. Since you have not informed us of any rules or policies of Texas Southern University that would prohibit this voluntary service, we will assume for purposes of this opinion that the volunteer coaching arrangement is consistent with the university's requirements. Nor have you inquired about a specific law. Thus, we will address the laws that we believe may be relevant to this situation.

Provisions on standards of conduct and conflict of interest for state officers and employees are found in chapter 572 of the Government Code. Section 572.051 of the Government Code prohibits a state officer from accepting other employment that would conflict with his or her loyalty to the agency. However, this restriction pertains to the individual's employment with an outside entity and does not reach volunteer service for the state agency to which loyalty is owed.

The common-law conflict of interest rule prohibits the regents of a state university from having a personal financial interest in contracts they enter into on behalf of the university.¹ The situation you describe does not involve a contract or a personal financial interest in a contract; accordingly, the common-law conflict of interest rule is not applicable.

The common-law doctrine of incompatibility is relevant to your question. This doctrine prohibits a person from holding two offices where one is accountable or subordinate to the other, or

¹Attorney General Opinions JM-817 (1987), V-640 (1948).

where there is an overlap of powers and duties such that one person could not disinterestedly serve in both offices.² It protects the integrity of state institutions by promoting impartial service by public officials.³ The common-law doctrine of incompatibility applies to employees as well as officers in cases where one person seeks to be both a public officer and an employee subject to appointment, supervision, or both by the public officer or the governing body of which the officer is a member.⁴ In Letter Advisory No. 114, this office determined that one person could not at the same time be employed as a school teacher by an independent school district and hold office as a trustee of the same district. The office and employment were legally incompatible, so that one person could not simultaneously hold both. A public officer may not hold a public employment if the officer, or the governing body of which he or she is a member, has supervisory responsibility over that employment. A municipal employee may not, for example, serve on the governing body of a city, where the employee is subject to the supervision of the governing body.⁵ The county judge may not serve as county emergency medical services administrator, where the county commissioner court appoints, supervises, and compensates the person holding that position.⁶ This aspect of the common-law doctrine of incompatibility is known as “self-employment” incompatibility.⁷

Chapter 106 of the Education Code vests the government of Texas Southern University in the board of regents⁸ and gives the board responsibility for appointing a president, the professors, and other officers and employees of the university, prescribing their duties, and fixing their salaries.⁹ The board “shall enact bylaws, rules, and regulations deemed necessary for the successful management and government of the institution,” and has authority to remove the officers and employees of the institution.¹⁰ The “self-employment” kind of incompatibility would clearly prevent a regent of Texas Southern University from also serving as an employee of the university.

²*Thomas v. Abernathy County Line Indep. Sch. Dist.*, 290 S.W. 152 (Tex. Comm’n App. 1927); *State ex rel. Brennan v. Martin*, 51 S.W.2d 815 (Tex. Civ. App.—San Antonio 1932, no writ); Attorney General Opinions DM-55 (1991), JM-203 (1984) at 3; Letter Advisory No. 114 (1975).

³Attorney General Opinion JM-203 (1984) at 3.

⁴Letter Advisory No. 114 (1975); *see also Ehlinger v. Clark*, 8 S.W.2d 666 (Tex. 1928) (commissioners court may not employ county judge as attorney for county).

⁵Letter Opinion No. 97-034 (1997).

⁶Letter Opinion No. 94-46 (1994).

⁷*See* Attorney General Opinion JM-1266 (1990) at 4; Letter Opinion 97-034 (1997).

⁸Educ. Code § 106.11.

⁹*Id.* § 106.31.

¹⁰*Id.*

However, opinions of this office as well as authorities from other states have held that a "volunteer" for an entity is not an employee for purposes of various statutes.¹¹ This office has addressed incompatibility questions involving volunteer firemen, but these do not provide general guidance with respect to volunteers. Volunteer firemen usually have a formal, ongoing relationship with the city,¹² and the city may provide them with some form of compensation.¹³ Incompatibility questions involving volunteer firemen are usually resolved on the facts of each case, without general discussion of the application of incompatibility law to volunteer work.¹⁴ The opinions on this subject do not stand for the proposition that volunteers for state agencies are employees for purposes of "self employment" incompatibility. We must therefore determine whether this aspect of incompatibility law would also prevent a regent from voluntarily, and at no cost to the university, coaching some of the players on the football team.

Accordingly, we will review the policies related to "self-employment" incompatibility and consider whether they bar the volunteer work you have described. Letter Advisory No. 114 pointed out specific areas of conflict between the office of trustee of an independent school district and the incompatible employment as a teacher in the same district. It stated that the trustees controlled the contractual terms and salaries of the teachers, had general supervisory power over them, and could interfere with the teacher's performance of duty.

The volunteer coaching provided by the regent of Texas Southern University would not result in the conflicts enumerated in Letter Advisory No. 114. The regent receives no payment or reimbursement for expenses and is not subject to a contract. He does not appear to hold a position

¹¹See Attorney General Opinions DM-457 (1997) at 3 (volunteer for state agency is not "employee" within Civ. Prac. & Rem. Code ch. 104); DM-409 (1996) at 6-7 (volunteers at regional poison control center are not employees within Health & Safety Code § 777.007). Attorney General Opinions of other states have said that an unpaid volunteer is not an employee for purposes of the common-law doctrine of incompatibility. 66 Ops. Cal. Att'y Gen. 176, No. 82-1207 (1983) (no consideration of public policy should prevent city councilman from giving city benefit of his services as uncompensated volunteer fireman); Op. Kan. Att'y Gen. No. 81-74 (1981) (volunteers are neither officers nor employees of city for purposes of incompatibility doctrine).

¹²See Letter Opinion No. 94-070 (1994) (volunteer fire department is private entity funded by the city).

¹³See V.T.C.S. art. 6243e, § 2(8) (under Texas Local Fire Fighters Retirement Act, "volunteer" is person who regularly performs services for fire department and either receives no compensation or receives less than \$200 a month); art. 6243e.3, § 1(14) (under statute establishing volunteer fire fighters' relief and retirement fund, a "volunteer" receives no monetary remuneration); Attorney General Opinion H-1122 (1978) (for purposes of article 6243e.3, V.T.C.S. "monetary remuneration" does not include municipality's furnishing of free water or water at special rates to volunteer firemen).

¹⁴For example, where volunteer firemen received no compensation except a future retirement benefit, it was a question of fact whether the office of city council member was incompatible with membership in volunteer fire department. Letter Advisory No. 154 (1978). Where the volunteer fire department was a private entity funded by the city, service as a volunteer fire fighter was not incompatible with membership on the city council. Letter Opinion No. 94-070 (1994). A Michigan court held that the position of city council member was incompatible with that of paid volunteer fire fighter for the city, where the city council had the final vote on a proposed contract between the city and fire fighters regarding their conditions of employment. *Wayne County Prosecutor v. Kinney*, 458 N.W.2d 674 (Mich. App. 1990).

with the university nor to have been assigned duties by the board of regents¹⁵ but contributes his coaching assistance when needed.¹⁶ This volunteer arrangement does not, in our opinion, provide sufficient occasion for conflict with the office of regent to invoke the common-law doctrine of incompatibility. Accordingly, the common-law doctrine of incompatibility does not bar this voluntary service. We conclude that a member of the Texas Southern University Board of Regents does not violate the common-law doctrine of incompatibility by performing unpaid volunteer coaching services for a section of the football team.

We caution that this arrangement may raise practical problems, for example, matters relating to the university's liability and accountability for the regent's volunteer work. The board of regents has general supervision over the program in which the individual regent volunteers, and any assistance provided by the regent must be consistent with rules, regulations, and guidelines established by the board under chapter 106 of the Education Code or chapter 2109 of the Government Code, which addresses volunteer programs established by governmental entities, as well as any other applicable law or regulations.¹⁷ The board of regents of Texas Southern University is the appropriate entity to determine whether or not a regent's uncompensated and minimal voluntary service to the university is in the best interest of the university and to regulate or prohibit such service as necessary for the proper operation of the university.

¹⁵See *Smith v. University of Texas*, 664 S.W.2d 180, 189 (Tex. App.—Austin 1984, writ ref'd n.r.e.) (head track coach at University of Texas had authority to appoint unpaid volunteer officials for track meet).

¹⁶His voluntary coaching is more readily characterized as additional duties related to his office as regent than as a separate position subject the common-law doctrine of incompatibility. See Attorney General Opinion DM-55 (1991).

¹⁷For example, rules of the collegiate athletic associations may be relevant.

S U M M A R Y

A member of the Texas Southern University Board of Regents does not violate the common-law doctrine of incompatibility by performing unpaid volunteer coaching services for a section of the football team, nor does this service constitute a violation of Government Code section 572.051 or of the common-law conflict of interest rule. Any voluntary assistance provided by the regent must be consistent with any rules, regulations, and guidelines established by the regents under chapter 106 of the Education Code or chapter 2109 of the Government Code, concerning volunteer programs established by governmental entities, as well as any other applicable laws or regulations.

Yours very truly,

A handwritten signature in black ink that reads "Susan Garrison". The signature is written in a cursive, flowing style.

Susan Garrison
Assistant Attorney General
Opinion Committee